Litigating the State Action Issue in Peremptory Challenge Cases

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I. Introduction

In *Batson v. Kentucky*,[1] the United States Supreme Court held that a criminal prosecutor may not violate the equal protection clause by exercising peremptory challenges in a particular case when the defendant and stricken jurors are of the same racial group.[2] There is already a burgeoning amount of literature on *Batson* and its broader implications.[3] Recent articles have examined *Batson*'s lower court implementation,[4] its implications for the peremptory challenge in general,[5] its significance for groups other than blacks,[6] and its possible application to civil trials.[7]

A growing number of litigants have sought to persuade courts to extend the logic of *Batson* to cases in which the criminal defendant, rather than the prosecutor, has exer-

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1. 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

2. *Batson*, 476 U.S. at 96.

3. *See, e.g.*, Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 SUP. CT. REV. 97 (P. Kurland, G. Casper & D. Hutchinson eds. 1988).

4. *See, e.g.*, Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson v. Kentucky*, 25 WILLAMETTE L. REV. 293 (1989).

5. *See, e.g.*, Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989); Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury In a Criminal Trial*, 102 HARV. L. REV. 808 (1989).

6. *See, e.g.*, Mayfield, *Batson and Groups Other Than Blacks: A Strict Scrutiny Analysis*, 11 AM. J. TRIAL ADVOC. 377 (1988).

7. *See, e.g.*, Patton, *The Discriminatory Use of Peremptory Challenges in Civil Litigation: Practice, Procedure and Review*, 19 TEX. TECH. L. REV. 921 (1988); Note, *The Civil Implications of Batson v. Kentucky and State v. Gilmore: A Further Look at Limitations on the Peremptory Challenge*, 40 RUTGERS L. REV. 891 (1988).

cised his peremptory challenges in an allegedly discriminatory manner.[8] Still others have attempted to extend the reasoning in *Batson* to the use of peremptory challenges in civil cases,[9] where the party exercising the challenges is a private, non-governmentally affiliated litigant.[10] The discriminatory use of peremptory challenges may generally be objected to as violative of a state statute[11] or state constitution.[12] The issue, however, is often litigated under a federal constitutional provision,[13] such as the equal protection component of the Fifth Amendment's due process clause,[14] or the Fourteenth Amendment equal protection clause,[15] which requires a showing of state action.[16]

It is settled law that an individual acting merely as a pri-

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8. *See, e.g.*, People v. Pagel, 186 Cal. App. 3d Supp. 1, 232 Cal. Rptr. 104 (1986), *cert. denied*, 481 U.S. 1028 (1987); People v. Gary M., 138 Misc. 2d 1081, 526 N.Y.S.2d 986 (N.Y. Sup. Ct. 1988); People v. Muriale, 138 Misc. 2d 1056, 526 N.Y.S.2d 367 (N.Y. Sup. Ct. 1988).

9. *See, e.g.*, Swapshire v. Baer, 865 F.2d 948 (8th Cir. 1989); Wilson v. Cross, 845 F.2d 163 (8th Cir. 1988); Maloney v. Washington, 690 F. Supp. 687 (N.D. Ill. 1988); Clark v. City of Bridgeport, 645 F. Supp. 890 (D. Conn. 1986); Esposito v. Buonome, 642 F. Supp. 760 (D. Conn. 1986); City of Miami v. Cornett, 463 So. 2d 399 (Fla. Ct. App.), *appeal dismissed*, 469 So. 2d 748 (Fla. 1985).

10. *See, e.g.*, Fludd v. Dykes, 863 F.2d 822 (11th Cir. 1989); Edmonson v. Leesville Concrete Co., 860 F.2d 1308 (5th Cir. 1988), *reh'g granted*, 860 F.2d 1308 (1989); Holley v. J&S Sweeping Co., 143 Cal. App. 3d 588, 192 Cal. Rptr. 74 (1983).

11. *See, e.g.*, People v. Irizarry, 142 Misc. 2d 793, 536 N.Y.S.2d 630 (N.Y. Sup. Ct. 1988) (criminal case involving prosecutor's striking of women potential jurors; discusses various state statutes).

12. *See, e.g.*, People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) (pre-*Batson* criminal case relying independently on California Constitution); State v. Slappy, 522 So. 2d 18 (Fla. 1988) (criminal case relying on Florida Constitution).

13. *See, e.g.*, Holley v. J&S Sweeping Co., 143 Cal. App. 3d 588, 192 Cal. Rptr. 74 (1983) (referring to Seventh Amendment and California Constitution); Fields v. People, 732 P.2d 1145 (Colo. 1987) (en banc) (criminal case relying on the Sixth Amendment as well as Colorado Constitution).

14. *See, e.g.*, *Fludd*, 863 F.2d at 824 & n.3; *Edmonson*, 860 F.2d at 1310 & n.9 (citing Bolling v. Sharpe, 347 U.S. 497 (1954)); United States v. Townsley, 856 F.2d 1189, 1191 (8th Cir. 1988) (en banc) (criminal case referring to the Sixth Amendment and "the Equal Protection Clause").

15. *See, e.g.*, *Ex parte* Branch, 526 So. 2d 609 (Ala. 1987); People v. Evans, 125 Ill. 2d 50, 530 N.E.2d 1360 (1988); People v. McDonald, 125 Ill. 2d 182, 530 N.E.2d 1351 (1988).

16. *See, e.g.*, *Fludd*, 863 F.2d at 828; *Edmonson*, 860 F.2d at 1311.

vate party cannot violate the equal protection clause, regardless of how patently invidious or harmful the party's conduct may be.[17] When an individual is acting as a private party, even a showing of intentional racial discrimination will not suffice to invoke constitutional protection.[18] In order for various federal constitutional protections to be operative through the Fourteenth Amendment, a party must show state or governmental action.[19]

The problem in applying the *Batson* reasoning is the current lack of authoritative Supreme Court guidance on state action questions arising in the context of peremptory challenges. State action will be uncontroversially present when a government prosecutor challenges, and the presiding judge excuses, prospective jurors in a criminal case.[20] State action should also normally be found when an attorney representing a governmental entity in a civil matter similarly exercises peremptory juror challenges.[21] The difficult state action cases arise when a criminal defendant or private civil litigant exercises the peremptory challenges. The Supreme

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17. *See Edmonson*, 860 F.2d at 1311.

18. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972) (alleged refusal of state-licensed lodge facility to serve alcohol to blacks).

19. *See* the authorities cited *supra* note 16. At the Supreme Court level, see generally National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. ____, 109 S. Ct. 454, 102 L. Ed. 2d 469 (1988); West v. Atkins, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988); Tulsa Prof. Collection Serv., Inc. v. Pope, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 552, 107 S. Ct. 2971, 97 L. Ed. 2d 427 (1987); Blum v. Yaretsky, 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978); Jackson v. Metro. Edison Co., 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974); Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961). The closest the Supreme Court has come to addressing the issue of state action in the context of a private litigant's peremptory strike of a juror is *Polk County v. Dodson*, 454 U.S. 312, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981).

20. *See Edmonson*, 860 F.2d at 1313.

21. *See, e.g.*, Clark v. City of Bridgeport, 645 F. Supp. 890, 895 n.6 (D. Conn. 1986).

Court has not yet provided specific guidance for the use of peremptory challenges by private civil litigants and criminal defendants.

In the absence of specific Supreme Court guidance, litigants naturally turn to Supreme Court decisions that adjudicate the state action issue in other contexts. Unfortunately, those cases offer little decisive direction because the various decisions provide rhetorical and precedential ammunition for both sides of the issue. This lack of clarity reflects the undeniably confused condition of contemporary state action case law in general.[22]

This Article briefly develops some of the relevant themes enunciated in *Batson*, and then moves to a critical discussion of the growing case law concerning the extension of *Batson* into areas raising difficult state action issues. In addition, this Article explores the arguments and case law that analyze the presence or absence of state action in a typical case and then proposes a solution to the state action problem. The Article concludes by expressing some reservations concerning the unavoidable theoretical complexity, speculativeness, and subjectivity, involved in defining and applying the *Batson* test in its present form.

II. *Batson* and the Commitment to Equal Protection in the Courtroom Itself

In *Batson*, the Court overruled, in part, its decision in

22. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-1, at 1690 (2d ed. 1988); Chemerinsky, *Rethinking State Action*, 80 N.W.U.L. REV. 503, 504 (1985); Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U.L.J. 683 (1984); Quinn, *State Action: A Pathology and a Proposed Cure*, 64 CALIF. L. REV. 146, 148 (1976); Rowe, *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of Flagg Brothers, Inc. v. Brooks*, 69 GEO. L.J. 745 (1981); Schneider, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change*, 60 NOTRE DAME L. REV. 1150 (1985); Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y. L. SCH. L. REV. 383 (1988). These authors reflect the strong academic consensus.

Swain v. Alabama.[23] In *Swain*, the Court recognized in principle that a criminal prosecutor's exercise of racially-based peremptory jury challenges might violate the equal protection clause.[24] The *Swain* Court noted that peremptory challenges themselves are not exercisable as a matter of constitutional right,[25] but viewed the peremptory challenge as a well-established means of arriving at a competent and impartial jury.[26]

More importantly, the Court in *Swain* determined that allowing the defendant to object to the prosecutor's alleged racially-based abuse of peremptory challenges in a particular case would unjustifiably impair the character of the peremptory challenge itself.[27] Therefore, the *Swain* Court left the criminal defendant without a remedy unless the defendant could somehow show that the prosecutor "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have . . . survived challenges for cause, with the result that no Negroes ever serve on petit juries."[28] Not surprisingly, *Swain* was widely interpreted as largely immunizing the prosecutor's peremptory challenge from serious scrutiny under the equal protection clause.[29] To require a showing of pervasive or historical racial discrimination in jury selection, however, would be inconsistent with the Constitution's implicit promise "of equal protection to all."[30]

In contrast to *Swain*, the Court in *Batson* was much more receptive to the idea of establishing illicit racial discrimina-

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23. 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965).
24. *See Swain*, 380 U.S. at 203-04.
25. *Id.* at 219.
26. *Id.*
27. *Id.* at 221-22.
28. *Id.* at 223.
29. *See* Batson v. Kentucky, 476 U.S. 79, 92-93, 106 S. Ct. 1712, 1720, 90 L. Ed. 2d 69, 84 (1986).
30. *See Batson*, 476 U.S. at 96.

tion in jury selection in a single act or a single case.[31] The Court recognized the inherent potential for abuse in allowing the unrestricted use of the peremptory challenge[32] and, therefore, established a general procedure for a criminal defendant to follow. The criminal defendant challenging the prosecutor's use of peremptory challenges on racial grounds "first must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."[33] The defendant is then allowed to refer to any relevant facts or circumstances in order to raise an inference of the prosecutor's purposeful discrimination.[34] If the defendant is able to successfully raise such an inference, thereby establishing a prima facie case of discrimination, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."[35]

The *Batson* Court therefore relied on a distinction between race-neutral and discriminatory explanations for peremptory challenges of blacks. As the concluding section of this Article demonstrates, this distinction appears to raise profoundly difficult questions not easily resolved in the courtroom context. The Court did not profess to offer a principled analysis of the distinction between race-neutral and discriminatory reasons, but it did specify that "the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause."[36] On the other hand, the

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31. *Id.* at 93.

32. *Id.*

33. *Id.* This language immediately raises issues left unresolved in *Batson*, such as the scope of "cognizable" racial, or non-racial, groups; the possibility of a defendant who is a member of one cognizable group objecting to peremptory challenges of members of other groups; the application of *Batson* in multi-party cases; and whether a defendant may object to the peremptory strike of a single individual juror. On the latter point, see *id.* at 99 n.22.

34. *See* Washington v. Davis, 426 U.S. 229, 241-42, 248, 96 S. Ct. 2040, 2048-49, 2052, 48 L. Ed. 2d 597, 608-09, 612 (1976).

35. *Batson*, 476 U.S. at 97.

36. *Id.*

prosecutor's explanation on rebuttal must rise above a mere denial of discriminatory motive.[37] The prosecutor's mere assertion of good faith,[38] or assumption that the challenged juror would tend to be partial to the accused because of their shared membership in a particular racial group, would not justify a prosecutor's peremptory strike of that juror.[39]

The *Batson* Court declined to specify definite procedures a defendant or court should use when contesting peremptory challenges.[40] The Court also failed to decide whether the prosecutor could object to the criminal defendant's exercise of peremptory challenges on the grounds that they were racially motivated.[41] The only guidance the *Batson* Court offered was how an appellate court should treat the trial court's reaction to racially challenged peremptory strikes. The Court stated that although an appellate court would give "great deference" to the trial judge's findings on matters of credibility,[42] it would be prejudicial error if the trial court denied the defendant a racially neutral explanation for the prosecutor's use of the challenged strikes.[43]

III. The Developing State Action Case Law Under *Batson*

The *Batson* case involved peremptory strikes exercised by a state criminal prosecutor and posed no serious state action issue because the state prosecutor was undeniably an officer of the state.[44] As a result, the Court declined to address the applicability of its principles to peremptory challenges by

37. *Id.* at 98.
38. *Id.*
39. *Batson*, 476 U.S. at 97.
40. *Id.* at 99.
41. *Id.* at 89 n.12.
42. *See id.* at 98 n.21 (citing Anderson v. Bessemer City, 470 U.S. 564, 575-76 (1985)).
43. *See id.* at 100.
44. *Id.* at 89.

criminal defendants or by private parties in civil cases.[45] A number of courts, however, have had occasion to consider state action issues in one form or another under the *Batson* decision.[46]

The Eleventh Circuit, in *Fludd v. Dykes*,[47] addressed one variation in which the state action issue may arise. *Fludd* involved a civil rights suit brought by a black plaintiff against a white police officer and the officer's white supervisor. The defendants peremptorily struck two potential black jurors on the venire and left an all-white jury.[48] The plaintiff's counsel urged that, under *Batson*, the defendants must give a race-neutral explanation for those challenges. The trial court overruled the plaintiff's objection on the grounds that *Batson* was inapplicable to civil cases.[49] On appeal, the Eleventh Circuit disagreed with the trial court's conclusion and remanded for a hearing along the lines discussed in *Batson*.[50]

The Eleventh Circuit duly recognized the presence of a state action issue. In fact, the court adopted a rather stringent formulation of the general inquiry into the presence or absence of state action. The court specified that "[t]o establish a violation of equal protection, a litigant must demonstrate that the state, and not a private individual, was the source of the purposeful discrimination."[51] The Supreme Court has itself occasionally presented similar understandings of what state action requires.[52] The Court, however,

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45. *See supra* note 41 & accompanying text.

46. Thomas v. Diversified Contractors, Inc., 551 So. 2d 343 (Ala. 1989) (The Alabama Supreme Court adopted the reasoning in Fludd v. Dykes, 863 F.2d 822 (11th Cir. 1989), and held that *Batson* applies to state civil cases between private litigants.).

47. 863 F.2d 822 (11th Cir. 1989).

48. *Fludd*, 863 F.2d at 823.

49. *Id.*

50. *See id.* at 823-24.

51. *Id.* at 828.

52. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1004, 102 S. Ct. 2777, 2756, 73 L. Ed. 2d 534, 546 (1982) (state action when state has coerced private party defendant in civil rights action, or has so significantly encouraged that party that

has also observed that "[i]n the typical case raising a state action issue, a private party has taken the decisive step that caused the harm . . ., and the question is whether the State was sufficiently involved to treat that decisive conduct as state action."[53]

This latter formulation allows a finding of state action even if the private actor was the "source" of the discrimination. The most straightforward analysis would suggest that in peremptory challenge cases, the "source" of the alleged discrimination is the party exercising the discriminatory peremptory challenges. Under this analysis, however, the state may become intimately involved through the actions of the trial judge, when the trial judge later ratifies, enforces, permits, or merely acquiesces or acknowledges such challenges.

A. Finding State Action

In the search for state action, the court in *Fludd* surprisingly brushed past the role of the party exercising the peremptory challenges and, instead, focused on the trial court's overruling of the plaintiff's motion. The *Fludd* court's analysis was surprising for three reasons. First, the challenging party would seem to be the obvious source or origin of the alleged discrimination, even if the "final" decision is left to the trial judge.[54] Second, the challenging party could be tied rather closely to the state itself because the defendants were a police officer and his supervisor who had allegedly violated the fourteenth amendment under color of state law.[55] The United States Supreme Court has often asserted that the requirements for acting under color of state

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"the choice must in law be deemed to be that of the State"); Rendell-Baker v. Kohn, 457 U.S. 830, 840, 102 S. Ct. 2764, 2771, 73 L. Ed. 2d 418, 427 (1982).

53. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. ____, ____, 109 S. Ct. 454, 462, 102 L. Ed. 2d 469, 484-85 (1988).

54. *See Fludd*, 863 F.2d at 828.

55. *Id.* at 823-24.

law are identical to those for showing state action.[56] It would not have been unusual for the *Fludd* court to find that, because the defendants were possibly acting under color of state law at the time of the underlying incident, they were also acting under color of state law in exercising their peremptory challenges.

Finally, by focusing on the trial judge's overruling of the plaintiff's objections to the defendant's peremptory challenges, the Eleventh Circuit created certain logical problems. Although the trial judge's authoritative ruling on an objection is state action, the logic of the *Fludd* Court's approach to finding state action under the *Batson* decision unravels. The court's analysis of the judge's role is that:

> In overruling the objection [to the use of peremptory challenges on racial grounds], which informed the court that the peremptory challenges may be excluding blacks from the venire on account of their race, the judge becomes guilty of the sort of discriminatory conduct that the equal protection clause proscribes. Because the trial judge constitutes the discriminatory state actor under the equal protection clause, we conclude that there is no constitutional bar to the application of *Batson* to a civil suit.[57]

The *Fludd* Court's reasoning may seem sound insofar as it suggests that the judges themselves engage in discriminatory conduct or issue discriminatory rulings. The *Fludd* decision's overall unsoundness, however, becomes evident when one examines the precise grounds on which the judge is to rule when the plaintiff objects to the defendants' misuse of the peremptory challenges. The objection at this early point

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56. *See, e.g.*, West v. Atkins, 487 U.S. 42, 48, 108 S. Ct. 2250, 2255, 101 L. Ed. 2d 40, 49 (1988); Lugar v. Edmondson Oil Co., 457 U.S. 922, 928-32, 935 & n.18, 102 S. Ct. 2744, 2749-51 & n.18, 73 L. Ed. 2d 482, 489-92, 494 & n.18 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 838, 102 S. Ct. 2764, 2769-70, 73 L. Ed. 2d 418, 425-26 (1982); United States v. Price, 383 U.S. 787, 794 n.7, 86 S. Ct. 1152, 1156-57 n.7, 16 L. Ed. 2d 267, 272 n.7 (1966).

57. *Fludd*, 863 F.2d at 828.

in the trial cannot be based on the trial judge's possible future conduct in overruling the objection itself and would be self-evidently premature. Instead, under *Batson* the objection must be that the defendants' conduct in exercising their peremptory challenges as they did violates the equal protection clause. When the plaintiff objects to the defendant's use of peremptory challenges, alleging that they were racially motivated, he is essentially asking the trial court whether it agrees with this contention. Under appropriate circumstances, the trial court may well wish to agree with the plaintiff's objection by finding that the defendants' conduct amounts to a prima facie case of violation of the plaintiff's right to equal protection. To be sustained on appeal, however, the trial court must find sufficient state action associated with the objectionable conduct.[58]

The trial judge's search for state action is confined to occurrences that have already taken place. The court's focus should normally be on the conduct of the party making the peremptory challenge, in the light of all the relevant circumstances. The relevant actions and circumstance include those of the courtroom, the trial process, the surrounding judicial system, and the trial judge's own role and decisions up to the point of the objection, including his excusing of those stricken jurors. If the facts do not supply sufficient state action, the trial court cannot supply state action by considering the possible incorrect ruling it would make in denying the *Batson* objection. If at the time of the objection there is insufficient state action, from whatever source, any objection to a peremptory challenge based on an alleged denial of equal protection must be overruled. The Eleventh Circuit's focus on the trial court's overruling of the defendant's objection and proceeding to trial as an element of the necessary

58. *See generally* Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961).

state action, therefore, seems mistaken.[59]

The Fifth Circuit in *Edmonson v. Leesville Concrete Co.*,[60] took a more traditional approach to the question of state action. In *Edmonson*, the plaintiff was a black construction worker who sued Leesville Concrete Company for negligence. At trial, the defendant peremptorily challenged two black and one white prospective jurors, leaving a jury of eleven whites and one black.[61] The plaintiff requested that the court require the defendant to present a racially neutral explanation for its use of its peremptory challenges. The trial court denied the plaintiff's motion on the grounds that the *Batson* requirements were not applicable to civil trials.[62] The Fifth Circuit reversed the trial court and found the requisite state action despite the private status of the party exercising the peremptory challenges.[63] The *Edmonson* court cited a number of Supreme Court cases where the Court found state action in a variety of contexts.[64] The court took what amounts to two separate routes in finding state action. For convenience, these will be referred to as the *Lugar*[65] route and the *Burton*[66] route.

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59. *Fludd*, 863 F.2d at 828. Whether the state action in *Fludd* should be shown under the Fifth Amendment, because of the role of the federal judge, or under the Fourteenth Amendment, because of the role of the arguably state-affiliated defendants, or under both, because of their joint roles, is fortunately a question of no great practical consequence.

60. 860 F.2d 1308 (5th Cir. 1988), *reh'g granted*, 860 F.2d 1308 (1989). Interestingly, Senior Circuit Judge John Minor Wisdom of the Fifth Circuit joined both the majority opinion in *Edmonson* and the opinion of the Eleventh Circuit in *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1984).

61. *Edmonson*, 860 F.2d at 1310.

62. *Id.*

63. *See id.* at 1314.

64. *E.g.*, Tulsa Prof. Collection Servs. v. Pope, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988); Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982); Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961); Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230, 77 S. Ct. 806, 1 L. Ed. 2d 792, *reh'g denied*, 353 U.S. 989 (1957); Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948).

65. Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982).

66. Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961).

B. The *Lugar* Route

Under the *Lugar v. Edmondson Oil Co.*[67] decision, the crucial question is whether the private actor whose conduct is being objected to may appropriately be called a state actor.[68] The private party defendants in *Edmonson v. Leesville Concrete Co.*[69] were not state actors, nor acting in the name of the state, when exercising their peremptory challenges. *Lugar*, however, suggests that sometimes the joint participation of a private party and a state official may establish the private party as a state actor.[70]

The *Lugar* method of finding state action is problematic. If the ultimate issue is whether a private litigant, or even an attorney, is a state actor, ample Supreme Court authority in other contexts suggests a negative answer.[71] Probably the single largest obstacle to finding state action in peremptory challenge cases via the *Lugar* method is the Supreme Court's analysis in *Polk County v. Dodson.*[72] In *Dodson*, the Court held that a public defender employed full-time by

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67. 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982).

68. *See* 860 F.2d at 1311 (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982)).

69. 860 F.2d 1308 (5th Cir. 1988).

70. *See id.* (quoting *Lugar*, 457 U.S. at 941).

71. *See, e.g.*, San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 107 S. Ct. 2971, 97 L. Ed. 2d 427 (1987) (United States Olympic Committee not a governmental actor for state action purposes); Blum v. Yaretsky, 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978) (warehouseman's sale of goods entrusted to him, pursuant to state statutory authorization, does not amount to state action even where such sales traditionally undertaken by sheriff); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974) (heavily regulated private utility monopoly not engaged in state action in discontinuing electric service pursuant to state's general procedural authorization). *See also* National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. ——, ——, 109 S. Ct. 454, 457 n.5, 102 L. Ed. 2d 469, 478 n.5 (1988) (citing recent cases holding that the National Collegiate Athletic Association is not a state actor for state action purposes).

72. 454 U.S. 312, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1982) (Judge Gee referred to *Dodson* in his dissenting opinion in *Edmonson*, 860 F.2d at 1316.).

Polk County did not act under color of state law[73] in filing a motion to withdraw from representing Dodson in his criminal appeal. The public defender's motion to withdraw was accompanied by a memorandum and an affidavit discussing the frivolous nature of Dodson's appeal.[74] The Iowa Supreme Court granted the defense attorney's motion and dismissed Dodson's appeal.[75]

While it is true that a state-employed public defender in some sense opposes the interests of "the state," the court in *Dodson* disposed of the argument that a lawyer representing her client before a court, while acting as an "officer of the court," must be considered a state actor.[76] Rather, the Court noted that the adversary system assumes that "a defense lawyer best serves the public not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.' "[77] Presumably, a court could apply the *Dodson* reasoning to attorneys in civil actions as well as public defenders in criminal cases. It would seem to follow that, under the *Lugar* test for state action, a private counsel exercising peremptory jury challenges would be considered a "state actor" in view of his "joint participation"[78] with the trial judge in making and giving effect to the peremptory challenges.

In *Edmonson v. Leesville Concrete Co.*,[79] however, Judge Gee noted in his dissent that the action of the trial judge in excusing the potential jurors peremptorily challenged by counsel appears to be ministerial in character.[80] The trial judge's involvement in excusing jurors in a civil case is no

73. The tests for state action and for acting under color of state law have been held to be equivalent. *See supra* note 56 & accompanying text.

74. *See Dodson*, 454 U.S. at 314-17.

75. *Id.* at 314-15 & n.2.

76. *Id.* at 318.

77. *Id.* at 318-19 (quoting Ferri v. Ackerman, 444 U.S. 193, 204, 100 S. Ct. 402, 409, 62 L. Ed. 2d 355, 363-64 (1979)).

78. Edmonson v. Leesville Concrete Co., 860 F.2d 1308, 1311 (5th Cir. 1988).

79. 860 F.2d 1308 (5th Cir. 1988).

80. *Id.* at 1316 (Gee, J., dissenting).

less ministerial than that of the Iowa Supreme Court in *Dodson*. The *Dodson* court made a judgment on the merits by deciding whether the withdrawing counsel's contention that her client's arguments on appeal were frivolous.[81] Even if a trial court in some sense approves of or acquiesces in counsel's peremptory challenges, mere approval or acquiescence by the government need not amount to state action.[82] The *Lugar* method of finding state action is, therefore, invalid because it hinges on whether the private party, whose action is being challenged, can be called a "state actor."

C. The *Burton* Route

The Supreme Court in *Burton v. Wilmington Parking Authority*[83] used an alternative method of finding state action. In *Burton*, a privately owned and operated restaurant located on government owned property refused service to a patron because he was black. The *Burton* Court found state action because the restaurant was located in a state-owned parking garage and paid rent to the state under its lease.[84]

The Court reasoned that, under the circumstances, the state had abdicated its responsibilities by failing to discourage or censure the evident racial discrimination of its private lessee.[85] The Court in *Burton* found a degree of mutual benefit[86] in the relationship between the restaurant and the state that may not be matched in a peremptory challenge case. How the trial court profits from a private litigant's dis-

81. *See Dodson*, 454 U.S. at 314-15 & n.2.

82. The Court has stated that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the fourteenth amendment." *Blum*, 457 U.S. at 1004-05. *See also Flagg Bros., Inc.*, 436 U.S. at 164-65 (state's acquiescence does not create state action); *Jackson*, 419 U.S. at 357 (private action in accordance with formal state permission or authorization as not rising to the level of state action).

83. 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961).

84. *Burton*, 365 U.S. at 712.

85. *Id.*

86. *Id.*

criminatory abuse of peremptory challenges is hardly clear.

The majority in *Edmonson v. Leesville Concrete Co.*[87] recognized the *Burton* decision and observed:

> The government is intimately involved in the process by which a litigant challenges a prospective juror: the government summons the venire to appear in court at a particular time and place; the right to peremptory challenges is granted by a federal statute; the challenges are invoked in the course of a judicial proceeding, and on a facility operated by the government . . .; they are not self-executing but are effected by the action of the judge; and the judge as government official acts in a court required by the Constitution to be open to the public which may thereby observe the court's toleration of the practice. The litigant exercises the peremptory challenge, but it is the judge, acting in a judicial capacity, who excuses the prospective juror.[88]

The *Edmonson* court does not appear to suggest that a government official's toleration of an otherwise private act generates state action. Rather, the court recognized that, under *Burton*, the overall circumstances under which the peremptory challenges are exercised may be such as to give rise to private as well as governmentally shared responsibility.

Utilizing the *Burton* method, the presence or absence of state action is a function of whether it would be appropriate to find the government at least partially responsible for the actions of a private party. Actually, a number of cases have discussed state action issues with reference to the idea of state responsibility.[89] State responsibility, and state action, in *Burton* may be said to flow from the circumstances. In

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87. 860 F.2d 1308 (5th Cir. 1988).

88. *Id.* at 1312.

89. *Burton*, 365 U.S. at 725, *see San Francisco Arts & Athletics, Inc.*, 483 U.S. at 522; *Blum*, 457 U.S. at 1004; *Lugar*, 457 U.S. at 936, 937; *Kohn*, 457 U.S. at 840; *Flagg Bros., Inc.*, 436 U.S. at 164; *Jackson*, 419 U.S. at 360 (Douglas, J., dissenting).

Burton, the "private" racial discrimination took place in a combination restaurant and public parking facility bearing "official signs indicating the public character of the building, and [which] flew from mastheads on the roof both the state and national flags."[90] The person subjected to racial discrimination in *Burton* might well have attributed this insult, at least in part, to the public authority.

Similarly, the plaintiff or the excused jurors in *Edmonson* might well, under the circumstances,[91] have ascribed at least partial responsibility for their discriminatory treatment to the state, because of the trial judge or the judicial process itself. Under such reasoning, the state's involvement with the discriminatory peremptory challenges might be deemed "so pervasive and substantial that it must be considered state action."[92]

It would be impractical in this Article to develop a theory of what kind or degree of responsibility would amount to state action, or what considerations or factors are relevant to ascribing responsibility.[93] One factor that is easy to overlook, however, is that of the gravity or seriousness of the harm allegedly inflicted. As a matter of common moral sense, we are more likely to impute responsibility to a bystander for failing to save a person from drowning than for failing to remove a painful hangnail, even if the cost of "rescue" is comparable in both cases. Undeniably, the harm of racial discrimination is so much more "serious" that one should be more willing to find government responsibility in racially-based peremptory challenge cases than in other non-racial contexts.[94]

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90. *Burton*, 365 U.S. at 720.

91. *See supra* text accompanying note 88.

92. Tulsa Prof. Collection Serv., Inc. v. Pope, 485 U.S. 478, 484, 108 S. Ct. 1340, 1346, 99 L. Ed. 2d 565, 577 (1988).

93. For an analysis along these lines, see Wright, *State Action and State Responsibility*, 23 SUFFOLK U.L. REV. ____ (1990).

94. *See, e.g.*, Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1291 (1982); Schneider, *State Action—Making Sense*

This is not to suggest that no significant difference exists between the degree of government involvement in criminal prosecutions and that in civil actions between merely private litigants,[95] or whether the *Batson* requirements should be applied to civil actions.[96] Until the Supreme Court authoritatively addresses the issue, courts will predictably continue to differ on the applicability of *Batson* to civil actions between private parties.[97]

Out of Chaos—An Historical Approach, 37 U. FLA. L. REV. 737, 742 (1985). *But see Jackson*, 419 U.S. at 373-74 (Marshall, J., dissenting) ("The Court has not adopted the notion, accepted elsewhere, that different standards should apply to state-action analysis when different constitutional claims are presented.").

95. *See* Edmonson v. Leesville Concrete Co., 860 F.2d 1308 (5th Cir. 1988).

96. Even as of the time of the panel decision in *Edmonson*, the court was able to refer to a division of authority on the applicability of *Batson* to civil cases. *See Edmonson*, 860 F.2d at 1314. It should be noted, however, that the *Edmonson* majority's reference to the Eighth Circuit's " 'strong doubts' that *Batson* is limited to criminal cases," *id.*, is misleading, in that the Eighth Circuit's "strong doubts" in dicta appear to run the other direction. *See* Wilson v. Cross, 845 F.2d 163, 164-65 (8th Cir. 1988); Swapshire v. Baer, 865 F.2d 948, 953 (8th Cir. 1989) ("[w]e have previously expressed 'strong doubts' whether *Batson* applies to civil cases") (citing *Wilson*, 854 F.2d at 163).

97. The number of cases addressing the state action issue in the general *Batson* context of course continues to increase. *See, e.g.*, Maloney v. Washington, 690 F. Supp. 687 (N.D. Ill. 1988) (applying *Batson* in a civil case to both the white police officer plaintiffs, thereby assuming whites to be a cognizable racial group, and the defendants, the City of Chicago and the estate of the late Mayor Harold Washington, with only a perfunctory discussion of the state action problems). The Seventh Circuit noted the issue in a related case, *Maloney v. Plunkett*, 854 F.2d 152, 155 (7th Cir. 1988), but declined to express an opinion on the state action issue. *See also* Clark v. City of Bridgeport, 645 F. Supp. 890, 895 & n.6 (D. Conn. 1986) (state action easily found in that the civil defendant, the City of Bridgeport, exercised its peremptory challenges through the official action of the assistant city attorney); Esposito v. Buonome, 642 F. Supp. 760 (D. Conn. 1986) (Meskill, J., sitting by designation) (finding *Batson* inapplicable in light of the objecting party's status as a voluntary plaintiff in a civil action, especially where the plaintiff had not shown himself to be a member of a cognizable racial group) (not reaching the state action issue); Perry v. Seaboard Coast Line R.R., 527 So. 2d 696, 698 n.1 (Ala. 1988) (declining to reach the issue of *Batson*'s applicability to a civil setting); Holley v. J&S Sweeping Co., 143 Cal. App. 3d 588, 192 Cal. Rptr. 74 (1983) (applying California state constitutional restrictions to use of peremptory challenges in civil case); City of Miami v. Cornett, 463 So. 2d 399 (Fla. Dist. Ct. App.), *appeal dismissed*, 469 So. 2d 748 (Fla. 1985) (restricting the use of peremptory challenges in a civil case under a Florida state constitutional provision; the peremptory challenges were exercised by attorneys for the City of Miami, thus minimizing any potential state action issue).

D. Applying *Batson* to Criminal Defendant's Use of Peremptory Challenges

Among the criminal cases raising a significant state action issue, one of the most elaborate discussions to date is contained in *People v. Gary M.*[98] In *Gary M.*, the state objected to a minority criminal defendant's use of peremptory challenges against white potential jurors.[99] The court concluded that a criminal defendant's racially discriminatory use of peremptory challenges may be prohibited by the New York and federal Constitution.[100] The court further concluded that white potential jurors may be considered a cognizable group under the equal protection clause.[101]

On the state action question, the court in *Gary M.* took into consideration seven factors, recognizing that perhaps none of these factors individually would be decisive.[102] The *Gary M.* court considered such factors as: (1) The occurrence of the discrimination in the context of a state criminal prosecution;[103] (2) The attorney engaging in the discrimination is a state-licensed and state-regulated officer of the court;[104] (3) The challenges were made in open court in a public courtroom;[105] (4) Peremptory challenges are highly regulated and are themselves not a matter of constitutional right;[106] (5) The racial character of the discrimination;[107] (6) The necessity for the court itself to exclude the chal-

98. 138 Misc. 2d 1081, 526 N.Y.S.2d 986 (N.Y. Sup. Ct. 1988).

99. *Gary M.*, 526 N.Y.S.2d at 988.

100. *Id.* at 992.

101. *Id.* at 994 (citing authority). *But cf.* United States v. Townsley, 856 F.2d 1189, 1190 (8th Cir. 1988) (en banc) (white criminal defendants may not object to government's striking of black potential jurors); United States v. Angiulo, 847 F.2d 956, 984 (1st Cir.), *cert. denied*, 109 S. Ct. 314 (1988).

102. *Gary M.*, 526 N.Y.S.2d at 992.

103. *Id.* at 992-93.

104. *Id.* at 993.

105. *Id.* (citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961)).

106. *Id.*

107. *Id.*

lenged juror;[108] and (7) The role of the state in bringing to court the juror who is challenged on racial grounds.[109]

The *Gary M.* court was well-aware that the Supreme Court in *Dodson* had not attached much weight to the "officer of the court" factor.[110] Arguably, the court in *Gary M.* underplayed the consideration that the state, in its role as prosecutor, had itself expressly and openly objected to and condemned the discriminatory challenges made by the private defense counsel.[111] This factor distinguishes the state action issue in *Gary M.* from that involved in most of the Supreme Court cases finding state action.[112]

Gary M.'s own methodology makes it difficult to discern whether this distinction is compelling in light of the other factors the court cites. If the seven factors separately are insufficient but, in the aggregate, point to state action, the result is inherently unpredictable when one or more factors is missing or somehow counterbalanced. Ultimately, the soundest determination of the state action issue posed in *Gary M.* will be one that focuses on the concept of responsibility.[113] In particular, state action should be based on the circumstances and appropriateness of assigning at least partial responsibility to the government for the consequences of the abuse of the peremptory challenge system.[114] *Gary M.* recognized[115] that any alleged racial discrimination, even against white[116] prospective jurors, is sufficiently serious to

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108. *Id.*

109. *Id.* at 993-94.

110. Polk County v. Dodson, 454 U.S. 312, 318, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1982); *see also Gary M.*, 526 N.Y.S.2d at 993 n.7.

111. *See Gary M.*, 526 N.Y.S.2d at 988-89.

112. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961) (government's failure to explicitly disavow or reject defendant-lessee's racial discrimination).

113. *See supra* notes 83-84 & accompanying text.

114. *See supra* note 94 & accompanying text.

115. *See Gary M.*, 526 N.Y.S.2d at 993.

116. *Cf.* City of Richmond v. J.A. Croson Co., 488 U.S. ____, ____, 109 S. Ct. 706, 721, 102 L. Ed. 2d 854, 882 (1989) (opinion of O'Connor, J.) ("equal protection cannot mean one thing when applied to one individual and something else

make it difficult for even a constitutionally limited government to disclaim responsibility.[117]

An additional factor bearing upon attributions of responsibility has to do with the possibility of government control. On most theories of responsibility, if the government was genuinely unable to identify and prevent the private act in question, one would be reluctant to ascribe responsibility for a private act to that government.[118] In a peremptory challenge context, a fair-minded and perceptive trial judge will doubtless be able to identify and prevent the empaneling of juries reflecting the most blatant and systematic racial discrimination in jury selection. The current application of the *Batson* test, however, may require the trial court to resolve complex and delicate issues of social philosophy. When, for example, does a prosecutor's apparently racially neutral explanation of a peremptory challenge fail because it involves a juror characteristic so closely correlated with race as to amount to a proxy for race itself?[119] Even then, the court

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when applied to a person of another color") (quoting Regents of the Univ. of California v. Bakke, 438 U.S. 265, 289-90, 98 S. Ct. 2733, 2747-48, 57 L. Ed. 2d 750, 770-71 (1978) (Powell, J.)).

117. The court in *People v. Muriale*, 138 Misc. 2d 1056, 526 N.Y.S.2d 367 (Sup. Ct. 1988), adopted a finding of state action in connection with peremptory challenges by a criminal defendant, largely on a theory of the "pervasive involvement" of the court itself in implementing racially-based peremptory challenges by the defendant. *See Muriale*, 526 N.Y.S.2d at 371. To the extent that *Muriale* suggests that state action may be merely a matter of finding the "participation, facilitation, and acquiescence" of the state in the discrimination, *id.*, the *Muriale* test may sweep too broadly. The presence of these elements clearly does not insure a finding of state responsibility, or state action. This can be seen in the example of the police participating in, facilitating, and acquiescing in an act of private racial or other discrimination by enforcing the removal of an unwanted social guest from private residential property under a general trespass law. The courts would presumably decline to find state action in such a context, at least without further complicating circumstances. *But cf.* Shelley v. Kraemer, 334 U.S. 1, 20, 685 S. Ct. 836, 845, 92 L. Ed. 2d 1161, 1184 (1948) (state action in court's enforcement of private racially restrictive covenant), *cited in Muriale*, 526 N.Y.S.2d at 372.

118. This sets aside possible complications such as the government's somehow benefitting from the private act, or ratifying and approving after the fact a private act that it was powerless to prevent.

119. *See* Alschuler, *supra* note 5, at 175. At an extreme, consider an allegedly race-neutral explanation in which the prosecutor asserts that he also would have challenged anyone else, black or white, who lived relatively close to the black de-

must go on to attempt, in a non-speculative way, to detect events or motives that are practically undetectable in a judicial setting. Consider, for example, the difficult problems of verification, of rebuttal, and of credibility in a prosecutor's claim that a black potential juror was challenged because of insufficient eye contact or a momentary facial expression.[120]

These latter sorts of problems are unavoidable under *Batson*, and the trial court will not be able to resolve them in a non-speculative, well-grounded manner. The recent California case of *People v. Johnson*[121] serves as an illustration.[122] In *Johnson*, a black criminal defendant objected to the prosecutor's peremptory challenges to three black, four Jewish, and two Asian jurors[123] in the course of a voir dire extending over a period of two months.[124] The prosecutor's explanations for such strikes included such elements as apparent tiredness, tell-tale smiling, general rapport, being "weird,"[125] the prosecutor's being "totally unable to relate"[126] to a juror, obesity, poor grooming, "a very defensive body position,"[127] lack of eye contact, a racing pulse at particularly telling moments,[128] and nervousness.[129]

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fendant's neighborhood. For a real-world example, see *Ex parte Branch*, 526 So. 2d 609, 614-15 (Ala. 1987) (prosecutor's alleged negative experiences in previous cases with both black and white employees of a major local black employer). For an example of the essential contestability of neutrality in the realm of gender, see *Price Waterhouse v. Hopkins*, 490 U.S. ____, ____, 109 S. Ct. 1775, 1813 n.5, 104 L. Ed. 2d 268, 315 n.5 (1989) (Kennedy, J., dissenting) (possible gender stereotyping in male's evaluation of a female as "overbearing and abrasive").

120. *See, e.g.*, *People v. Johnson*, 47 Cal. 3d 1194, 767 P.2d 1047, 255 Cal. Rptr. 569 (1989) (en banc).

121. 47 Cal. 3d 1194, 767 P.2d 1047, 255 Cal. Rptr. 569 (1989) (en banc). On the peremptory challenge issues, the court was split 5-2.

122. California cases in this area are typically influenced by the California Constitution as interpreted in *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), but the problems discussed in this section are endemic to cases decided under *Batson*.

123. *Johnson*, 767 P.2d at 1054.

124. 767 P.2d at 1056.

125. *Id.* at 1054.

126. *Id.*

127. *Id.* at 1055.

128. *Id.* The prosecutor apparently believed himself able to count a juror's pulse rate in response to particular questions "from jewelry bobbing or from actually

The majority in *Johnson* relied on the trial judge's ability to somehow ferret out sham or contrived excuses.[130] In doing so, the California Supreme Court returned to a deferential standard of review of the trial court's findings[131] and thus overruled its own recent precedent on the point.[132] The problem, however, is not primarily one of the extent to which the findings of the trial court should receive deference on review, or whether "trivial" reasons for exercising peremptory challenges should suffice,[133] or the "subjective" quality of an attorney's reasons for peremptory strikes.[134] The larger problem is that neither the trial nor appellate court is likely to be able to sort out prosecutorial explanations that are pretextual or self-deceiving.[135] Whether, for example, a prospective juror momentarily glared at one or more persons in the course of voir dire is simply not subject to consistently accurate judicial resolution.

This kind of problem is not easily resolved, short of abolishing the peremptory challenge. One possible solution would be to abolish or dramatically restrict the opportunity of the party exercising the peremptory challenges to rebut

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seeing veins in the neck." *Id.* at 1091.

129. These and other grounds are referred to in *Johnson*, 767 P.2d at 1054-55.

130. *See id.* at 1054.

131. *Id.* at 1057.

132. *Id.* (overruling in part People v. Trevino, 39 Cal. 3d 667, 704 P.2d 719, 217 Cal. Rptr. 652 (1985)).

133. *See id.* at 1055.

134. *See id.* at 1085-86 (Mosk, J., dissenting). Presumably, matters such as failure to make eye contact, or wearing a beard, are objective matters, in the sense that they are in principle observable by all interested participants. Whether such matters actually tend to correlate with conviction or acquittal-proneness, or juror competence, is presumably also something that is susceptible of research and measurement to at least a substantial degree.

135. For one of a number of lists of unweighted non-exhaustive factors a judge may wish to consider in attempting to pass judgment on the credibility of the prosecutor's explanations in rebutting a prima facie case of discrimination, see, for example, *State v. Slappy*, 522 So. 2d 18, 22 (Fla. 1988). *See also Ex parte Branch*, 526 So. 2d 609, 622-23 (Ala. 1987) (listing similar considerations as relevant to whether the objecting party has made out a prima facie case of discrimination). For a discussion of some of the problems associated with this sort of open-ended multi-factor judicial test, see Epstein, *The Risks of Risk/Utility*, 48 OHIO ST. L.J. 469 (1987).

opposing counsel's prima facie case of discrimination.[136] Limiting the challenged party's opportunity to rebut would be worthwhile for the sake of reducing the opportunity for the exercise of conscious or unconscious racism[137] in jury selection. From the standpoint of the state action issue, such a reform would reduce the strength of the argument that no state action should be found because the state should not bear responsibility for what it cannot with any reliability identify and control.

136. See the description of this rebuttal phase in *Batson v. Kentucky*, 476 U.S. 79, 97-98, 106 S. Ct. 1712, 1723-24, 90 L. Ed. 2d 69, 88-89 (1986).

137. *See Batson*, 476 U.S. at 106 (Marshall, J., concurring).